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No. 78-614

In the Supreme Court of the United States

OCTOBER TERM, 1978

CONSTRUCTION & GENERAL LABORERS' UNION LOCAL 1140, a/w INTERNATIONAL LABORERS' UNION OF NORTH AMERICA, AFL-CIO, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-14) adjudging petitioner in civil contempt is reported at 577 F. 2d 16. The report of the court's special master (Pet. App. 15-47) is unpublished. The previous contempt and enforcement decrees and underlying Board order are unpublished.

JURISDICTION

The judgment of the court of appeals (Pet. App. 48-51) was entered on May 8, 1978; the court denied petitioner's request for rehearing en banc (Pet. App. 53) on June 14, 1978. On August 31, 1978, Mr. Justice Blackmun extended the time in which to file a petition for certiorari to October 11, 1978 (Pet. App. 54), and the petiiton was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the court of appeals properly sustained the special master's finding that a union official was acting on behalf of the union, and not in his capacity as pension fund trustee, in authorizing certain picketing which violated outstanding court decrees.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, 29 U.S.C. 158, are set forth at Pet. 4-5.

STATEMENT

1. In 1968, the court of appeals entered a consent decree enforcing an order of the Board against petitioner remedying secondary boycott activity violative of Section 8(b)(4)(B) of the National Labor Relations Act, 29 U.S.C. 158(b)(4)(B). The order required, *inter alia*, that the Union and its officers

cease and desist from engaging in efforts (a) to induce or encourage employees to cease work and (b) to threaten, coerce, or restrain employees, "where an object thereof is to force or require any * * * employers or persons to cease doing business with * * * any other employer or person" (Pet. App. 17). In 1972, upon petition of the Board, the Union was found by the court of appeals to have acted in contempt of the 1968 court decree, and prospective fines were imposed for any future violations of the terms of the decree (Pet. App. 17-19).

In August 1975, the Board filed a second petition for a contempt adjudication, alleging that the Union had engaged in further secondary activity violative of the earlier decrees. The court of appeals appointed a special master to hear evidence and make findings of fact and recommendations (Pet. App. 4). Following a trial, the master found that the Union had violated the court's decrees by engaging in unlawful secondary activity (Pet. App. 36-43).

Thus, at the Fremont site, the master found that the Union picketed a general contractor (Knudson) in order to force it to cease doing business with a non-union subcontractor (Kahler) which had refused the Union's demand to use union labor or pay union scale and contribute to the Union's trust funds (Pet. App. 23-29, 41-42). At the Omaha site, the master found that the Union picketed a subcontractor (Underwood) with which it had contractual relations in furtherance of its dispute with the general contractor

(Lanco) who did not have a collective bargaining relationship with the Union (Pet. App. 30-35, 42-43).[1]

The master rejected the Union's contention that Leonard Schaefer, the Union's business manager and secretary-treasurer, as well as a trustee of the Contractors, Laborers, Teamsters and Engineers Health & Welfare and Pension trusts ("the Trusts"), had authorized the picketing against Knudson and Underwood solely in his capacity as trustee of the Trusts to enforce certain obligations incurred by those employers to the Trusts, and not in his capacity as Union agent to further the Union's dispute with Kahler and Lanco. Concerning the Fremont site, the master noted that, although the Union contended that the Trusts had a dispute with Knudson, the picketing did not begin until after the Union's dispute with Kahler arose (Pet. App. 29-30, 42). And he concluded (Pet. App. 42): "The facts of this case show that picketing of both Knudson and Kahler was done to put pressure on Knudson to cease doing business with Kahler" (Pet. App. 42).

With respect to the Omaha site, the master pointed out that Schaefer admittedly had not even thought of picketing Underwood until the Union's dispute with Lanco arose (Pet. App. 35), and that the Underwood

[1] The master also found contumacious the Union's activity at another construction site in which it attempted to coerce a neutral general contractor to cease doing business with a subcontractor with which the Union had a dispute (Pet. App. 20-23, 40-41). The Union does not challenge the validity of that finding here.

picketing was limited to the Lanco site (although Underwood was not working there at the time, but was working elsewhere) (Pet. App. 42-43). The master concluded that the Union's picket signs alleging Trust obligations on the part of Underwood were utilized in order to "stretch[] out the dispute at the [Omaha] site as long as possible, * * * [in order] to put more pressure on the neutral subcontractors and coerce them to stop doing business with Lanco" (Pet. App. 43).

2. The court of appeals accepted the master's findings, agreeing that the Board had, "by clear and convincing evidence, demonstrated that the Union engaged in unlawful secondary activity proscribed by the Court's prior decrees * * *" (Pet. App. 5). The court rejected the Union's argument that "picketing to enforce trust fund contribution requirements cannot be attributed to [it] since Schaefer was acting as a trustee in arranging the picketing" (Pet. App. 7). The court stated (*ibid.*):

> The Special Master found, in essence, that the CLT&E trust picketing was pretextual and had, in both cases, a purpose of impermissibly furthering Union goals by causing a cessation of business between primary and secondary employers. On the facts found by the Master, this conclusion is compelling.

The court added (Pet. App. 8; footnote omitted):

> The Union incorrectly asserts that the issue presented by these circumstances is whether a

> union trustee of an employee benefit trust authorized by Section 302(c)(5) of the Labor Management Relations Act (LMRA), 29 U.S.C. 186(c)(5), is an agent of the union for the purposes of Section 8(b) of the NLRA. *Cf. N.L.R.B.* v. *Carpenters Local No. 1913*, 531 F. 2d 424, 426-427 (9th Cir. 1976). To the contrary, the question here is simply whether Schaefer, who is both a union officer and a trustee, was operating on behalf of the Union or the trust beneficiaries when he authorized and directed the picketing of secondary employers. This is a finding of fact. We read the Master as finding that the purported trust picketing was motivated primarily by a desire to advance Union goals. As noted, that finding is not clearly erroneous.

The court concluded, "we hold only that in using his position as trustee to accomplish Union objectives, Schaefer was acting not as a trustee, but as a Union agent" (Pet. App. 10).

Having found that the Union violated the 1972 purgation order which provided for specific fines in the event of non-compliance, the court, *inter alia*, fined it $19,000 and warned that it would double the fines for any further violations (Pet. App. 12-14).

ARGUMENT

Petitioner contends that a union official acting in his capacity as trustee of an employee benefit fund should not be deemed to be acting on behalf of the Union for purposes of Section 8 of the NLRA. Assuming *arguendo* the validity of this contention, that

situation is not presented here. The court of appeals, upholding the master's findings, concluded that Schaefer, when he "use[d] a relatively minor deficiency in employer performance * * * as a pretext for picketing intended to promote union goals," was not acting in the interest of the Trusts' beneficiaries in his capacity as a trustee, but rather in the Union's interest in his capacity as Union business agent and secretary-treasurer (Pet. App. 10). The only question actually presented on this record, then, is whether that factual finding is clearly erroneous. Such an issue does not warrant review by this Court. See *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 490-491 (1951). Moreover, as we have shown, there is ample evidentiary support for the master's findings.[2]

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[2] *Sheet Metal Workers International Association*, 234 N.L.R.B. No. 162 (1978) (Pet. 19-20), is not inconsistent with the decision here. It simply holds, *inter alia*, that trustees of a trust fund established pursuant to Section 302(a)(5) of the Labor Management Relations Act, 29 U.S.C. 186(c)(5), are not, merely because of their role in administering the fund, collective bargaining representatives of the employer within the meaning of Section 8(b)(1)(B) of the NLRA, 29 U.S.C. 158(b)(1)(B).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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